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NO.

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IN THE

Supreme Court of the United States

October Term, 1984

THE OMEGA CORPORATION OF CHESTERFIELD,

Petitioner,

v.

D. DUANE MALLOY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

I. WHETHER IT IS A DENIAL OF EQUAL PROTECTION FOR A STATE COURT TO ENFORCE A SINGLE-FAMILY DEED RESTRICTION SO AS TO ALLOW HOUSEHOLDS SUCH AS THREE UNRELATED SCHOOLTEACHERS AND HOUSEHOLDS CONTAINING MAIDS, GOVERNESSES AND THE LIKE WHILE PROHIBITING HOUSEHOLDS OF FOUR MENTALLY RETARDED PERSONS LIVING WITH COUNSELORS WHO SERVE AS SURROGATE PARENTS?

PARTIES

Petitioner, The Omega Corporation of Chesterfield, is a private, non-profit Virginia corporation with no parent company, subsidiaries or affiliates. Respondents are the following individuals: D. Duane Malloy, Cynthia R. G. Malloy, Frank Barone, Diane Barone, Vernleigh H. Morton, Alfrieda T. Morton, Norbert S. Keeney, Evelyn V. Keeney, William R. Hill, III, Louis W. Headley, Sr., Eileen H. Headley, Virginia B. White, Davene S. Winters, Kenneth D. Dotson, Judith H. Dotson, Wyatt D. Mitchell, Amy L. Hofmann Mitchell, Jeffrey R. Cosgrove, Lorraine M. Cosgrove, Marvin O. Lindsey, Ken A. Clayton, Gail A. Clayton, Robert Lee Cobb, Beverly B. Cobb, Peter Sattelmayer, Theresa Sattelmayer, Elwood G. Everington, Frances Everington, D. Allen White, Pam White, Marvin W. Bubie,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

THE OMEGA CORPORATION OF CHESTERFIELD,

Petitioner,

v.

D. DUANE MALLOY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

The Omega Corporation of Chesterfield respectfully petitions for a Writ of Certiorari to the Supreme Court of Virginia to review the judgment

rendered in this case on September 7, 1984.

OPINIONS BELOW

The majority opinion of the Supreme Court of Virginia by Chief Justice Carrico is reported at 228 Va. ____, 1 VLR 12 (1984), and is set forth beginning at page 1a of the Appendix. The dissenting opinion of Justice Thomas is reported at 228 Va. _____, 1 VLR 21 (1984), and is set forth beginning at page 22a of the Appendix. The Letter Opinion of the Circuit Court of the County of Chesterfield by Judge Gates is unreported and is set forth beginning at page 38a of the Appendix.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on September 7, 1984. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the first section of the Fourteenth Amendment:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Omega Corporation of Chesterfield, a non-stock, non-profit, Virginia corporation (Omega), owns a lot in each of two subdivisions in Chesterfield County, Virginia on which it proposes to build homes to provide mentally retarded adults with normal residential housing. The subdivisions are known as Providence Pines and Scottingham. Before construction of the homes began, homeowners in each subdivision sought injunctions prohibiting the homes on the grounds of deed restrictions which provide in relevant part:

> No lot shall be used except for residential purposes. No buildings shall be erected, altered, placed, or permitted to remain on any lot other than one detached, single-family

> dwelling not to exceed two stories in height. (App. 3a)

At trial, Omega presented evidence in support of twenty-one proposed findings of fact (App. 50a-58a), all of which were adopted by the trial court (App. 38a). The findings relevant to this petition are:

> 8. To be eligible for one of the proposed homes, a person must be a resident of Chesterfield County, eighteen years of age or older, and moderately mentally retarded.
>
> 9. It is expected that each resident will live in the proposed homes for at least two to three years and that some may live in the homes for the rest of their lives.
>
> 10. Four mentally retarded adults will reside in each home. A counselor employed by Chesterfield Mental Retardation Services will be present in each home at all times. This responsibility is to be shared by three counselors employed for each home. The role of the

counselors will be that of surrogate parents.

13. Aside from the counselors assisting the residents in learning to care for themselves and in learning to perform the various household chores, no educational or vocational training of any kind will be provided at the homes for the residents. Nor will any medical or nursing care be provided at the homes.

14. The residents and counselor will function together as a single housekeeping unit, preparing their own meals, eating together, sharing common facilities and sleeping in ordinary bedrooms.

15. In virtually all respects, other than the mental capacity of those who live on the premises, the homes will operate like a typical suburban household.

20. "Single-family" dwelling is not defined in the restrictive covenants of either Providence Pines or Scottingham. Neither of the developers of these subdivisions had any intention of restricting occupancy of homes in the subdivisions to people related

> by blood or marriage. No such restriction has ever been enforced in the subdivisions. Across the street from the Omega lot in Providence Pines, three unrelated women school-teachers reside in the home at 8613 Shady Mist Drive. (App. 53a-58a)

Despite finding as fact that the homes would operate as described above, the trial court concluded that only "single-family use" was permitted for homes in the subdivisions and that Omega's proposed homes were therefore excluded (App. 40a). Without defining what constituted "single-family use", the trial court summarily concluded:

> A single-family use does not include occupancy by unrelated persons who live in the home with a counselor. (App. 40a)

On November 5, 1981, the trial court entered permanent injunctions against Omega's proposed homes. (App. 44a-49a)

In so doing, the trial court rejected Omega's arguments, made orally and in its written brief,[1] that such injunctions would constitute a denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. The trial court made no attempt to address the equal protection issue.

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[1] In its October 2, 1981 trial brief, Omega argued:

> In the final analysis, the only real distinction between Omega's proposed homes and the existing homes in the subdivisions is that the residents of the Omega homes will be mentally retarded. The restrictive covenants do not prohibit occupancy by the mentally retarded. Even if they did, they would be unenforceable, because to enforce such a restriction would be a denial of equal protection. Shelley v. Kraemer, 334 U.S.1, 68 S. Ct. 836, 92 L.Ed. 1161 (1948); see Fowler v. United States, 633 F.2d 1258 (8th Cir. 1980).

Omega appealed to the Virginia Supreme Court, citing as one of the trial court's errors that the trial court's ruling denied equal protection in violation of the United States Constitution.[2]

The Virginia Supreme Court affirmed the trial court's injunctions. In its majority opinion, the court acknowledged that the proposed homes would be "for residential purposes" (App. 12a), that

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[2]Omega's third of three assignments of error in its December 9, 1981 Petition for Appeal to the Virginia Supreme Court was:

> The Circuit Court erred in enforcing the restrictive covenants as interpreted by the Court because doing so resulted in a denial of equal protection in violation of the United States Constitution.

"except for the mental capacity of the occupants, the homes would operate like typical suburban households in 'virtually all respects'" (App. 7a-8a), and that the deed restrictions in question did not prohibit occupancy by "three unrelated schoolteachers" or prohibit "'housekeepers, governesses, tutors, butlers, valets and the like' from living with families in the subdivisions." (App. 15a) Nevertheless, the court found the proposed homes objectionable because of the presence of counselors:

> The record shows that counselors who are public employees qualified by training and experience to handle handicapped persons would be present in the homes on a rotating basis "providing needed supervision" at all times, even while the residence of the homes are asleep. We can conceive of nothing more antithetical to the concept of family homelife than the

> constant surveillance of purported family members by government employees assigned to supervise them.
>
> The presence of the counselors in the homes and their supervision of the occupants would convert what might otherwise have been a single-family use into what the chancellor termed "a facility". (App. 17a-18a)

The Supreme Court offered no rationale for why supervision of mentally retarded persons by government-employed counselors was antithetical to family life while other forms of supervision were not. The court made no attempt to address Omega's argument that such a discriminatory interpretation of the deed restrictions was a denial of equal protection.[3]

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[3] In a footnote to the majority (Footnote Continued)

Justice Thomas presented the equal

(Footnote Continued)
opinion, the Virginia Supreme Court stated:

> On brief, Omega argued that the chancellor's injunctions result in a denial of equal protection because they discriminate against unrelated persons and those who are mentally retarded. This point, however, was neither discussed nor expressly reserved at oral argument; hence, we consider the point waived. Stevens v. Ford Motor Co., 226 Va. 415, 417 N., 309 S.E.2d 319, 320 N. (1983). (App. 20a)

During oral argument, the discriminatory nature of excluding Omega's proposed homes while allowing other groups of unrelated persons and households with maids, governesses and the like was discussed. In addition, counsel for Respondents specifically criticized Omega's "equal protection under the law" argument (App. 67a). While the specifics of Fourteenth Amendment equal protection analysis were not discussed, counsel for petitioner intended no waiver of Omega's Fourteenth Amendment claim and was not aware that a procedure not expressed in

(Footnote Continued)

protection issue as one of the grounds for his dissent:

> The majority opinion is also disturbing because of the classification it develops. The majority states that it is willing to accept a broad definition of the word family. As a result, the majority accepts as a single-family three unrelated schoolteachers who live together in a house, households containing maids, governesses, tutors, butlers and others. Indeed, the majority does not attempt to say what groups will be included in its broad definition of family. All it concludes is that four unrelated mentally

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(Footnote Continued)
the Rules of the Virginia Supreme Court could cause so central an issue to be subject to such inadvertant waiver. Omega's Fourteenth Amendment claim was made at trial, was assigned as error on appeal and was fully briefed (App. 59a-66a). It is addressed in Justice Thomas's dissenting opinion (App. 31a-33a). Under these circumstances the federal question was timely and properly raised so as to give this Court jurisdiction to review the Virginia Supreme Court judgment.

> retarded persons and a counselor do not fall within that broad definition. The explanation for the exclusion of the family group proposed by Omega is that the counselors will surveil and supervise the mentally retarded family members. The suggestion is that watching over and supervising individuals is somehow antithetical to the concept of family. In my view, watching over and supervising members of a family who need such attention is central to families. The majority's explanation for excluding from the definition of family a group made up of a counselor and four individuals is unsatisfactory. The majority has drawn a line which will exclude appellants while including virtually everybody else. The facts and circumstances of this case do not support this result. (App. 31a-33a)

After consideration of the September 7, 1984 majority and dissenting opinions, Omega determined to continue pursuit of its equal protection claim by seeking review from this Court.

REASONS FOR GRANTING THE WRIT

In Cleburne Living Center v. City of Cleburne, Tex., 726 F.2d 191 (5th Cir. 1984), cert. granted, 53 U.S.L.W. 3355 (U.S. November 13, 1984) (No. 84-468), the United States Court of Appeals for the Fifth Circuit held that a city zoning ordinance prohibiting a group home for mentally retarded persons was unconstitutional on its face and as applied under intermediate scrutiny equal protection analysis. This Court has granted review of Cleburne to consider whether intermediate scrutiny was appropriate. The present case also involves discrimination against a group home for mentally retarded persons. Here, the source of the discrimination is the state-court-created definition of

"single-family use" rather than the actions of a city council. In both cases, a government-created rule is at issue.

It is well established that the actions of state courts as well as the actions of other branches of state government may result in the denial of rights guaranteed by the Fourteenth Amendment. Shellcy v. Kraemer, 334 U.S. 1, 17-18, 68 S. Ct. 836, 92 L.Ed. 1161 (1948). In Shelley, this Court specifically held that state court enforcement of a racially restrictive covenant constituted state action in violation of the equal protection clause of the Fourteenth Amendment. Here, the Supreme Court of Virginia has not only discriminated against mentally retarded persons by enforcing a restrictive covenant, it

has created the definition of "single-family use" that is the basis for the discrimination. This is state action, subject to equal protection analysis, even more fully than the state action in Shelley.

If discrimination against mentally retarded persons is subject to heightened or intermediate scrutiny as held in Cleburne, supra, the Virginia Supreme Court's judgment in this case is clearly offensive to the equal protection clause of the Fourteenth Amendment. The Virginia Supreme Court has articulated no important governmental objectives served by its definition of family, nor has it indicated how excluding four mentally retarded persons and a counselor from its definition of family was substantially related to achieving any government

objective. This is especially true since groupings of other unrelated persons and the presence of maids, governesses and the like were deemed to fall within the court's definition of family.

Even if the Virginia Supreme Court's definition of family is tested merely for rationality, the exclusion of Omega's proposed homes because of the presence of counselors fails the test. There is no rational basis for such discrimination under the factual findings in the case concerning the counselors:

> The role of the counselors will be that of surrogate parents.
>
> With the help of the counselors, [the mentally retarded residents] will perform the various duties incident to the normal operation of the home, cooking, cleaning, shopping and similar household chores.
>
> Aside from the counselors assisting the residents in

> learning to care for themselves and in learning to perform the various household chores, no educational or vocational training of any kind will be provided at the homes for the residents. Nor will any medical or nursing care be provided at the homes.
>
> The residents and counselors will function together as a single housekeeping unit preparing their own meals, eating together, sharing common facilities and sleeping in ordinary bedrooms.
>
> In virtually all respects, other than the mental capacity of those who live on the premises, the homes will operate like a typical suburban household. (App. 53a-55a)

These findings of fact establish that the counselors will serve as surrogate parents performing the functions of parents typical in a suburban household. This precludes, rather than provides, a rational basis for discriminating against

the group homes because of the presence of the counselors.

The Supreme Court of Wisconsin in Crowley v. Knapp, 228 N.W.2d 815 (1980), has held that eight mentally retarded adults and their surrogate parents constitute a "family" within the meaning of a restrictive covenant similar to the one in this case. In so doing, it noted that to interpret the word "family" otherwise in enforcing a private deed restriction would be a violation of the equal protection clause of the Fourteenth Amendment. Id. at 823, n. 2.

Private deed restrictions have become the rule in residential subdivisions. If courts are allowed to ignore the requirements of equal protection when interpreting undefined or ambiguous terms in such deed restrictions, unpopular

groups will suffer from state courts what the Fourteenth Amendment forbids them to suffer at the hands of the other branches of state government.

Teachers, other professionals, unmarried couples, students and a host of other combinations of persons commonly reside together in single households in today's society. Numerous courts have recognized this fact and have adopted a definition of family that focuses on whether the persons live together as a single housekeeping unit.[4] The Virginia

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[4] Crowley v. Knapp, supra; Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn. 1981); J. T. Hobby & Sons, Inc. v. Family Homes of Wake County, Inc., 274 S.E.2d 174 (N.C. 1981); Montana v. District Court, 609 P.2d 245 (Mont. 1980); Malcolm v. Shammie, 290 N.W.2d 101 (Mich. App. 1980); Bellamine (Footnote Continued)

Supreme Court stands in conflict with these cases and with the Fifth Circuit in Cleburne, supra. The need to remedy this conflict is well described by quoting from the opinion in Cleburne at page 192:

> The segregation of one group from the rest of society has been the historical benchmark of unfair discrimination in this country. Such segregation perpetuates false stereotypes about the exiled group and

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(Footnote Continued)
Hills Ass'n v. Residential Systems Co., 269 N.W.2d 673 (Mich. App. 1978); Hessling v. City of Broomfield, 563 P.2d 12 (Colo. 1977); Village of Freeport v. Association for the Help of Retarded Children, 406 N.Y.S.2d 221 (Sup. Ct. 1977); Little Neck Community Ass'n v. Working Organization for Retarded Children, 383 N.Y.S.2d 364 (App. Div. 1976); Douglas County Resources, Inc. v. Daniel, 280 S.E.2d 734 (Ga. 1981); Mongony v. Bevilacqua, 432 A.2d 661 (R.I. 1981); City of West Monroe v. Ouachita Ass'n for Retarded Children, Inc., 402 So.2d 259 (La. App. 1981); Linn County v. City of Hiawatha, 311 N.W.2d 95 (Iowa 1981).

> leads to a virtual caste system built on misconceptions ...
>
> Moreover the effects of such segregation are especially pernicious when the outcast group lacks the political power to resist unfair categorization. Courts have carefully scrutinized legislation [and judicial rule-making] that discriminates against politically impotent groups, for under those circumstances the danger is great that the statute [or judicial rule] will reflect and enshrine untrue stereotypes.

False stereotyping built on misconceptions is an apt characterization of the Virginia Supreme Court's condemnation of Omega's proposed homes. The role of the counselors is not "antithetical" to family homelife simply because the Virginia Supreme Court characterized it as "constant surveillance". This unjust treatment of Omega's proposed homes should be remedied.

CONCLUSION

Omega's petition for a writ of certiorari to the Supreme Court of Virginia should be granted.

Respectfully submitted,

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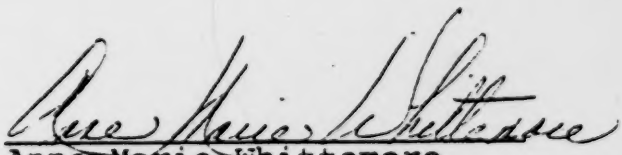
December 6, 1984

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for a Writ of Certiorari to the Supreme Court of Virginia with Appendix were mailed by depositing the documents in a United States Post Office with first-class postage prepaid, addressed to N. Leslie Saunders, Jr., Esq., Saunders & Pannell, 2500 Pocoshock Place, P. O. Box 35001-C, Richmond, Virginia, 23235, counsel of record for Respondents, on this 6th day of December, 1984.



Anne Marie Whittemore

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Present: All the Justices

THE OMEGA CORPORATION OF CHESTERFIELD

OPINION BY CHIEF JUSTICE HARRY L. CARRICO

v. Record No. 812080 September 7, 1984

D. DUANE MALLOY, ET AL.

FROM THE CIRCUIT COURT OF CHESTERFIELD COUNTY
Ernest P. Gates, Judge

This appeal involves a proposal to construct and operate group homes for the mentally retarded in subdivisions subject to restrictive covenants which limit uses to "residential purposes" and prohibit buildings other than "single-family" dwellings. The subdivisions in question are Providence Pines and Scottinghma, both located in Chesterfield County.

The Omega Corporation of Chesterfield, a nonstock, nonprofit Virginia corporation (Omega), owns one

lot in each subdivision. Omega proposed to build a dwelling on each lot "to provide mentally retarded adults with normal residential housing in a community setting including the activities and life-style incident to such a setting."

On June 12, 1981, D. Duane Malloy and his wife and other owners of lots in Providence Pines filed a bill of complaint seeking to restrain Omega from using its lot in the subdivision for a group home for the mentally retarded. On July 13, 1981, Robert Lee Cobb and his wife and other homeowners in Scottingham filed a bill of complaint seeking similar relief against Omega with respect to the lot it owned in that subdivision. (The plaintiffs in the two suits will be referred to collectively as Homeowners.) Both suits were based upon alleged

violations of the subdivisions' restrictive covenants, which run with the land. The pertinent portions read as follows:

> No lot shall be used except for residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single-family dwelling not to exceed two stories in height.[1]

The two suits were heard together on October 2, 1981, and taken under advisement by the chancellor. After the parties submitted memoranda, the chancellor issued a letter opinion declaring his intention to restrain Omega from using its lots for the group homes in question. On November 5, the chancellor entered permanent injunctions against Omega.

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[1]The Providence Pines restrictive
(Footnote Continued)

On November 18, 1981, Omega filed a petition with this Court seeking dissolution of the injunctions under Code § 8.01-626. WE dismissed the petition and published an order stating that, because the injunctions were final judgment, the summary procedure authorized by Code § 8.01-626 was not the proper vehicle for seeking dissolution of the injunctions. Omega Corp. v. Cobb, 222 Va. 875, 292 S.E.2d 44 (1981). Omega then proceeded via the proper appeal route under Code § 8.01-670 and is here on an appeal awarded September 2, 1982.

The record shows that the Virginia Housing Development Authority has loaned

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(Footnote Continued)
covenant contains the additional phrase "... and an attached private garage for not more than two cars."

Omega the funds to purchase the lots and has committed to lend the money to construct the group homes. The United States Department of Housing and Urban Development has approved the homes and has agreed to provide rent subsidies to those mentally retarded residents whose incomes qualify them for assistance. The residents would contribute one-fourth of their adjusted incomes toward rent.

The homes would be licensed by the Commonwealth, and the occupants would be supervised by counselors employed by the Chesterfield Mental Retardation Services. Three counselors would be assigned to each home on a "rotation", with one counselor "there at all times."

Omega proposed to assign four mentally retarded adults to each home. Eligibility standards require each

applicant for admission to be "a resident of Chesterfield County, eighteen years of age or older, and moderately mentally retarded."

Some of the prospective occupants are presently inmates of state institutions, but the majority live with their families or in "some other kind of situation." It is contemplated that, after staying in the group homes, some of the occupants would be "able to move out and go on ... their own, and a few [would] go back into institutions, and the majority [would] stop at the group home level"; all are expected to remain two or three years, and "some may live in the homes for the rest of their lives."

On weekdays, the residents would leave the homes in early morning for work, vocational training, or "some

[other] day activity," returning in late afternoon. Assisted by counselors, the occupants would spend their time at home cleaning house, cooking, and performing similar chores. Time at home would also be spent watching television, listening to music, and playing games. On week-ends, the residents would go to the movies or on shopping or field trips, in addition to their usual leisure-time activities.

Aside from the assistance furnished by the counselors, no training of any kind would be provided the residents in the homes, and they would not receive any medical attention there. The residents and counselors would "function together as a single housekeeping unit." Except for the mental capacity of the occupants, the homes would operate like typical

suburban households in "virtually all respects."

At trial, the developer of Providence Pines noted in his testimony the lack of any definition of the term "single-family" in the restrictive covenants in question. He then testified he had never interpreted the term to require that occupants of homes in the subdivision be related by blood or marriage and had never attempted to enforce "such a restriction." The developer of Scottingham testified to the same effect.

In his letter opinion, the chancellor stated:

> I believe that the restrictive covenants in question limit the use of the buildings to single family dwellings, as well as the type of construction. I believe that a single family dwelling means what it says.

> Only one family can inhabit the dwelling.... A single family use does not include occupancy by unrelated persons who live in the home with a counselor.

Omega disagrees with the chancellor's analysis of the covenants. Omega contends that the first sentence of the covenants creates a "use restriction," limiting the use of any lot to "residential purpose." The second sentence, Omega asserts, creates a "structural restriction," controlling the type of buildings that may be constructed, not the type of persons who might choose to live in them.

There is "really no dispute," Omega says, that its use of the proposed dwellings would be residential; indeed, the evidence showed conclusively that the proposed use would be residential. Neither is there any dispute, Omega continues, that the proposed dwellings

satisfy the single-family structural requirement of the restrictive covenants; in fact, the chancellor found that the architectural committees of both subdivisions had approved the structural plans for the buildings with full knowledge of the use Omega intended to make of its property.

Yet, Omega complains, instead of focusing on the "the type of buildings to be constructed and whether they were to be used for residential purposes," the chancellor improperly focused on "the type of persons who would live in the buildings." As a result, Omega asserts, the chancellor incorrectly gave the "single-family dwelling" language both use and structural effect.

Virginia precedent, however, supports the dual effect the chancellor gave the

"single-family dwelling" language. In Schwarzschild v. Welborne, 186 Va. 1052, 45 S.E.2d 152 (1947), the restrictive covenant under review provided that "there [should] not be erected more than two (2) dwellings" on the land conveyed. Id. at 1054, 45 S.E.2d at 153. Our opinion states:

> The defendant contends that this restriction applies to the kind of building to be erected. We do not think so. A covenant that prescribes the type of building to be erected necessarily limits the use that may be made of it after it is erected. A covenant to build only a dwelling would not be kept by building a dwelling and then using it as a grocery store or a funeral parlor.

Id. at 1057-58, 45 S.E.2d at 155.

Omega argues that Schwarzschild is inapposite because the case dealt only with the word "dwelling" in a restrictive covenant; no use was prescribed. Here,

Omega says, the first sentence of the restrictive covenants limits use to "residential purposes," and it is improper to consider the term "single-family dwelling" in the second sentence as a further limitation upon use.

We disagree with Omega. The covenants must be read as a whole. Friedberg v. Building Committee, 218 Va. 659, 665, 239 S.E.2d 106, 110 (1977). When so read, the covenants specify that only dwellings designed structurally for single-family occupancy may be erected and that the buildings may be used only for single-family residential purposes.

Homeowners appear to concede that Omega's use of the buildings in question will be for residential purposes. This leaves for consideration, therefore, the question whether Omega's proposal to house

mentally retarded persons in the buildings constitutes single-family use.

On this question, Omega cites Schwarzschild for the proposition that restrictive covenants are to be strictly construed against the parties seeking to enforce them and that they will be enforced only where the intention to limit the use of property is clear. In this case, Omega argues, there is nothing in the language of the restrictive covenants which makes clear that "persons unrelated by blood or marriage are to be excluded from the subdivisions"; further, the chancellor "found as fact that the intention of the developers was not to limit residency ... to persons related by blood or marriage (emphasis in original). Under these circumstances, Omega concludes, the chancellor's ruling that "the restrictive

covenants prohibit persons unrelated by blood or marriage from living in the subdivision[s] is clearly wrong."

The difficulty with this argument is that the chancellor did not rule, as Omega claims, that the restrictive covenants in question prohibit persons unrelated by blood or marriage from living int he subdivisions. What the chancellor did rule is that "[a] single family does not include occupancy by unrelated persons who live in the home with a counselor" (emphasis added).

There is a world of difference between Omega's interpretation of the chancellor's ruling and his actual holding. All the chancellor's holding means is that the single-family nature of a use is destroyed when the element of supervision by counselors is added to the

occupancy of unrelated persons. The holding does not mean, as Omega suggests, that "three unrelated schoolteachers" cannot live together in the subdivisions or that the restrictive covenants prohibit "housekeepers, governesses, tutors, butlers, valets, and the like" from living with families in the subdivisions.

Even so, Omega declares, the chancellor's definition of the word "family" is unduly restrictive. The "commonly accepted" meaning of the word, Omega submits, is "[t]he collective body of persons who live in one house." Furthermore, Omega asserts, respectable judicial authority supports both a broader meaning of the word "family" and a recognition that homes for the mentally retarded do not violate single-family provisions of restrictive covenants. In this connection, Omega

cites: Malcolm v. Shamie, 95 Mich. App. 132, 290 N.W.2d 101 (1980); Bellarmine Hills v. Residential, 84 Mich. App. 554, 269 N.W.2d 673 (1978);[2] State, Etc. v. District Court, Etc., 609 P.2d 245 (Mont. 1980); Hobby & Son v. Family Homes, 302 N.C. 64, 274 S.E.2d 174 (1981); and Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980).

We agree with Omega that the word "family" should be interpreted broadly in favor of permitting the proposed use; this

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[2]Panels of the Court of Appeals of Michigan appear to be at odds with one another in this area of the law. In Jayno Hts Ass'n v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978), a panel held that the use of a dwelling as a home for elderly women was violative of a restrictive covenant limiting occupancy to "one single family unit." This, of course, differs from the holdings by other panels in Malcolm and Bellarmine.

is the natural corollary of the rule that restrictive covenants must be construed strictly against those seeking to enforce them. The result sought by Omega, however, would require that we give an unrealistic meaning to the word "family."

The record shows that counselors who are public employees qualified by training and experience to handle handicapped persons would be present in the homes on a rotating basis "providing needed supervision" at all times, even while the residents of the homes are asleep. We can conceive of nothing more antithetical to the concept of family homelife than the constant surveillance of purported family members by government employees assigned to supervise them.

The presence of the counselors in the homes and their supervision of the

occupants would convent what might otherwise have been a single-family use into what the chancellor term "a facility." While the effort to provide "a facility" for the care of the mentally retarded is praiseworthy indeed, the fact remains that the use to which Omega wishes to put its property is institutional in nature and not familial.

Omega insists, however, that we cannot ignore the "many cases" from other jurisdictions in which homes for the mentally retarded have been held to satisfy the requirement of single-family provisions of zoning ordinances. [3] Omega

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[3] Omega cites the following cases: Hessling v. Broomfield, 193 Colo. 124, 563 P.2d 12 (1977); Freeport v. Help of Children, 94 Misc. 2d 1048, 406 N.Y.S.2d

(Footnote Continued)

also points to Virginia's public policy that mentally retarded persons "should not be excluded by county or municipal zoning ordinances from the benefits of normal residential surroundings." Code § 15.1-486.2. Omega then argues that this statement of public policy cannot be frustrated by the undefined term "single-family dwelling" in restrictive covenants.

We deal in this case, however, with private contractual rights arising from restrictive covenants, and not with provisions of zoning ordinances. The parties apparently interpret Chesterfield County's zoning ordinance to permit the

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(Footnote Continued)
221 (1977); and Little Neck Assn. v. WORCI, 52 App. Div. 2d 90, 383 N.Y.S.2d 364 (1976).

group homes proposed by Omega; if this interpretation is correct, the ordinance would promote the public policy declared in Code § 15.1-486.2. But Chesterfield's zoning ordinance cannot relieve the lots in question from the restrictive covenants to which they are subject. Ault v. Shipley, 189 Va. 69, 75, 52 S.E.2d 56, 58 (1949). The zoning decisions cited by Omega, therefore, are inapposite.

For the reasons assigned, the judgments appealed from will be affirmed.[4]

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[4]On brief, Omega argued that the chancellor's injunctions result in a denial of equal protection because they discrininate against unrelated persons and those who are mentally retarded. This point, however, was neither discussed nor expressly reserved at oral argument; hence, we consider the point waived. Stevens v. Ford Motor Co., 226 Va. 415, 417 n., 309 S.E.2d 319, 320 n. (1983).

Affirmed.

Thomas, J., dissenting.

THE OMEGA CORPORATION OF CHESTERFIELD

v. Record No. 812080

D. DUANE MALLOY

Thomas, J., dissenting.

The restrictive covenant relied on by the Homeowners cannot be fairly read to prohibit the activity complained of. The majority opinion marks a sharp departure from the way in which the Court has traditionally looked at restrictive covenants; it misapplies Schwarzchild v. Welborne, 186 Va. 1052, 45 S.E.2d 152 (1947); and it creates a threadbare distinction between conduct that violates the covenant and conduct that does not. In my opinion, the conclusion reached by the majority is bad law which will prove unworkable.

Traditionally, in Virginia, we have strictly construed restrictive covenants. Lewis v. Henry, 69 Va. (28 Gratt.) 192 (1877). Moreover, we have placed upon those who would enforce a restrictive covenant the burden of proving that the activity complained of falls within the terms of the restriction relied upon. Schwarzchild, 186 Va. at 1058, 45 S.E.2d at 155. In that same opinion, we stated that restrictive covenants are not favored in the law and that "[t]hey are to be construed most strictly against the grantor and persons seeking to enforce them, and substantial doubt or ambiguity is to be resolved in favor of the free use of property and against restrictions". Id. In addition to the foregoing, historically, we have focused upon the precise language used in

the restriction without adding to or subtracting therefrom. Further, we have been careful not to imply that which was clearly stated. The majority opinion ignores these well-developed principles.

It would be difficult to image or to draft a restrictive covenant which more clearly sets forth a use restriction on the one hand and a structural restriction on the other. Both of the restrictive covenants considered in this appeal contained the following language:

> No lot shall be used except for residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single-family dwelling not to exceed two stories in height.

The first sentence contains the word "used." This means that where the drafter intended to limit use he knew

exactly what to write in order to accomplish that result. The majority concedes that Omega's use of the property would comply with the residential use restriction contained in the first sentence.

Significantly, the second sentence makes no mention of "use" or "used." The second sentence does not mention those words because it is not concerned with use. It is concerned with the type of building to be constructed on the property. In every respect, the predicate of the second sentence makes unmistakably clear that the sentence pertains to the structure that may be placed upon the lot, not the use to which the structure may be put. The second sentence requires no more than that the structure erected on the lot be a

dwelling and that that dwelling meet the following description: that it be one structure, that it be detached, that it be single-family, and that it not exceed two stories in height. One can easily visualize a building that complies with these structural restrictions quite apart from any consideration of its use. Like the other descriptors in the list, "single-family" refers to a structural characteristic of a dwelling: one designed to accommodate a single cooperative living unit. In this sense, "single-family" is a short-hand reference for a type of design.* The majority concedes that the structure would comply with the restriction.

When the restrictive covenant is read as a whole, it is obviously a two-part restriction with the first part

relating to use and the second part relating to structure. Nevertheless, the

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*An analogous short-hand reference appears in the Providence Pines restrictive covenant which contains the additional proviso that the lot owner may erect "an attached private garage for not more than two cars." No one would dispute that a "two-car garage" may be used for purposes other than housing cars. Surely this covenant would not be violated if a lot owner used such a garage to house a truck, a boat, two or more motorcycles, or even old newspapers.

majority claims that by reading the covenant as a whole it finds a use restriction in the second sentence. What the majority has actually done is read language into the second sentence which cannot be found there. According to the majority, when read as a whole, "the covenants specify that only dwellings designed structurally for single-family occupancy may be erected and that the

buildings may be used only for single-family residential purposes." Ante, at _____ (emphasis added). The italicized language pinpoints the critical flaw in the majority opinion; that language cannot be found in the restrictive covenants here under review. That language was created and supplied by the majority. The majority's "reading" of the covenant can be more properly characterized as a re-write of that covenant. The majority's treatment of the restrictive covenant directly contravenes the rules this Court has evolved over the centuries concerning construction of restrictive covenants.

According to the majority, Schwarzchild v. Welborne justifies reading a use restriction into the second sentence of the covenant. In

Schwarzchild, we said that the word "dwelling" when used by itself necessarily referred to both use and structure. However, in my view, the majority's reliance upon Schwarzchild is misplaced. The majority ignores the fact that there we struck down an attempt to restrict use of the subject property, while here Schwarzchild is relied upon to uphold a restriction. In essence, the majority attempts to utilize a portion of Schwarzchild while distinguishing the great bulk of that opinion which runs counter to the majority's rationale.

Because of the central role Schwarzchild plays in the majority's analysis, that decision deserves detailed treatment. There, a homeowner sought to rent rooms in her house. Her deed contained a restrictive covenant which

made two references to the word "dwelling." The deed said "there shall not be erected more than two dwellings" and "such improvements shall be a dwelling or two dwellings." 186 Va. at 1057, 45 S.E.2d at 154-155. The restrictive covenant in Schwarzchild was not comprised of a use component and a structural component. Instead, the restriction was embodied in one word: "dwelling." In trying to decide whether rentals could be permitted under the restriction, we rejected the argument that the word "dwelling" had no impact on the use to which the property could be put. We commented that in our view, it would be improper to build what looked like a dwelling then use it for a funeral home. Thus, we concluded that the word "dwelling," when used as it was in

Schwarzchild, "necessarily" limited use. By contrast, in the instant appeal, there is no necessity to imply a use restriction. In this case, we need not fear that a building will be used for any thing other than a residential purpose. We do not need to imply a use restriction because one is stated explicitly.

The majority opinion is also disturbing because of the classification it develops. The majority states that it is willing to accept a broad definition of the word family. As a result, the majority accepts as a single-family three unrelated school teachers who live together in a house, households containing maids, governesses, tutors, butlers and others. Indeed, the majority does not attempt to say what groups will be included in its broad definition of

family. All it concludes is that four unrelated mentally retarded persons and a counselor do not fall within that broad definition. The explanation for the exclusion of the family group proposed by Omega is that the counselors will surveil and supervise the mentally retarded family members. The suggestion is that watching over and supervising individuals is somehow antithetical to the concept of family. In my view, watching over and supervising members of a family who need such attention is central to families. The majority's explanation for excluding from the definition of family a group made up of a counselor and four individuals is unsatisfactory. The majority has drawn a line which will exclude appellants while including virtually everybody

else. The facts and circumstances of this case do not support this result.

I would reverse the judgment of the trial court, and dissolve its injunction.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of September, 1984.

The Omega Corporation
of Chesterfield, Appellant,

against Record No. 812080
Circuit Court Nos. C-8237-81
and C-8341-81

D. Duane Malloy, Cynthia R. G. Malloy, Frank Barone, Diane Barone, Vernleigh H. Morton, Alfrieda T. Morton, Norbert S. Keeney, Evelyn V. Keeney, William R. Hill, III, Louis W. Headley, Sr., Eileen H. Headley, Virginia B. White, Davene S. Winters, Kenneth D. Dotson, Judith H. Dotson, Wyatt D. Mitchell, Amy L. Hofmann Mitchell, Jeffrey R. Cosgrove, Lorraine M. Cosgrove, Marvin O. Lindsey, Ken A. Clayton, Gail A. Clayton, Robert Lee Cobb, Beverly B. Cobb, Peter Sattelmayer, Theresa Sattelmayer, Elwood G. Everington, Frances Everington, D. Allen White, Pam White, Marvin W. Bubie, Rebecca D. Bubie, Stephen H. Grayberg, Ruth Grayberg, R. J. Rountree, Brenda Rountree, James Phillips, Jr., Sandy Phillips, E. S. Kile, Teresa T. Kile, John O. Stein, II, Geraldine G. Stein, William

R. Petzold, Patricia A. Petzold, Paul E. Walsh, Jr., Beverly B. Walsh, Randy B. Cox, Fay C. Cox, D. C. Foxx, R. T. Foxx, Dorothea M. Smith, A. J. Christopher Wood and David A. Schneider, Appellees.

Upon an appeal from judgments rendered by the Circuit Court of Chesterfield County on the 5th day of November, 1981.

For reasons stated in writing and filed with the record, the Court is of opinion that there is no error in the judgments appealed from. Accordingly, the judgments are affirmed. The appellant shall pay to the appellees thirty dollars damages and the costs expended herein.

This order shall be certified to the said circuit court.

A Copy,

Teste:

/s/ Allen L. Lucy

Clerk

Appellees' costs:

Attorney's fee	$50.00
Cost of printing brief not to exceed $200- for each appellee -Code § 14.1-182	?

Teste:

/s/ Allen L. Lucy

Clerk

12th Judicial Circuit
County of Chesterfield
City of Colonial Heights
Judges Chambers
Chesterfield, Virginia 23832

October 2, 1981

Mr. N. Leslie Saunders, Jr.
Saunders & Pannell
2500 Pocoshock Place
P. O. Box 35001-C
Richmond, Virginia 23235

Re: D. Duane Malloy, et als, Plaintiffs,
vs. #8273-81
The Omega Corporation
of Chesterfield Defendant.

and

Robert Lee Cobb et als, Plaintiffs,
vs. #8341-81
The Omega Corporation
of Chesterfield Defendant.

Dear Mr. Saunders:

The Court adopts Omega's proposed findings of fact and additional findings and facts from testimony given at the trial as the evidence in this case, which is disclosed by the transscript taken at

the hearing. There is no conflict in the evidence or facts.

The sole question to be determined by this Court is whether or not the construction and operation of the group homes as described by the witnesses violate the restrictive covenants to which both subdivisions are subjected, and whether or not the Omega Corporation of Chesterfield shall be enjoined from constructing and operating said group homes in Scottingham, Section H, and Providence Pine subdivisions.

The Virginia Supreme Court in Schwarzschild v. Welborne, 186 Va. 1052 said, "A covenant that describes the type of building to be erected necessarily limits the use that may be made of it after it is erected."

I believe that the restrictive covenants in question limit the use of the buildings to single family dwellings, as well as the type of construction. I believe that a single family dwelling means what it says. Only one family can inhabit the dwelling. Viewed in their entirety, the Court should not make narrow and disconnected determinations as to the meaning of the restrictions. The Court should not resort to legal fiction and seek ingenious subleties of interpretation to evade the plain intent of the developer to restrict the property to single family use. A single family use does not include occupancy by unrelated persons who live in the home with a counselor.

I do not believe I should follow the decision in Bellarmine Hills Association

v. Residential Systems Company, 269 N.W. 2d 673. I distinguish the two cases in New York and the one in Colorado cited by defendant from this case.

The Court should not make the subtle interpretations made by the North Carolina court in J. T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 274 S.E. 2d 174.

The use proposed in this case makes the building to be constructed a facility. The dissent of the Chief Justice and Justice Haskins in the Hobby case is more in line with Virginia law.

I concur in Mr. Justice Colley's dissent in Crowley v. Knapp, 288 N.W. 2d 815.

The use proposed in the present case is not to be used by a family. It is a group use with a counselor.

I quote from the dissent in the Crowley v. Knapp case:

> "Certainly I am as interested as the majority in aiding and helping to provide adequate care, housing and assistance to the more unfortunate members of our community, but within the confines of any lawful restrictions provided in the deed to the land. Those individuals who have invested their life savings in land and a home. 'The American Dream' are entitled to protection under the law, including enforcement of the covenant, which they relied on when investing in the area, restricting use of the property to that of single family residences. The majority opinion has in effect eliminated the single family restriction by defining family as '...a group of people who live, sleep, cook and eat upon the premises as a single housekeeping unit...' Are we to assume from this opinion that a group of 30 or 40 retarded or inform adults or children would constitute a family?
>
> 'Family' is used in many ways. Charles Manson's group was a 'family'. The Pittsburg Pirates are a 'family'. But it is obvious, at least to me, that the restrictive covenants in this case would have prevented either from occupying the property in question. It is the

> obligation of this Court to make a common-sense decision as to whether the restriction has been violated, bearing in mind the context in which the term is used. A rigorous definition is not necessary, because it is clear that a group of eight retarded adults and two caretakers does not constitute a single family."

These group homes cannot be used in Providence Pines and Scottingham subdivisions. It is proper in this case to enter an injunction against an inconsistent use. The Court will enjoin the defendant from the proposed use. Please prepare the proper order submitting it to Mr. King for him to note his objection.

Sincerely yours,

/s/ Ernest P. Gates

Ernest P. Gates

EPG/wgwc

cc: Donald E. King
/ McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219

V I R G I N I A

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

D. DUANE MALLOY, et als, Plaintiffs,

v.

THE OMEGA CORPORATION OF CHESTERFIELD Defendant.

Case Number 8237-81

D E C R E E

This cause came to be heard upon the plaintiff's Bill of Complaint; upon the Answer of the defendant; upon the testimony of witnesses and exhibits introduced on behalf of the plaintiffs and defendant at the hearing of this cause on October 2, 1981; and upon argument of counsel and Memoranda of Authorities submitted on behalf of plaintiffs and defendant.

Upon consideration of all of which, and pursuant to the written Opinion Of The Court filed among the papers in the suit and incorporated by reference herein, the Court is of the opinion to and does hereby ADJUDGE, ORDER and DECREE that defendant, its agents and employees be and they hereby are permanently and perpetually enjoined and restrained from constructing, using and maintaining a structure on Lot 5 Block A Providence Pines to house unrelated persons who dwell in said structure with counselors, or for any other purpose or use other than a single-family residence. To the action of the Court in enjoining defendant, its agents and employees as herein decreed, defendant objects and excepts.

Enter 11/5/81

/s/ Ernest P. Gates
Ernest P. Gates, Judge

Seen:

/s/ N. Leslie Saunders, Jr. p.d.
N. Leslie Saunders, Jr.

Seen and Objected to:

/s/ Donald E. King p.q.
W. Alan Aimes, Jr.
Donald E. King
Steven C. McCallum

V I R G I N I A

IN THE CIRCUIT COURT OF THE COUNTY OF CHESTERFIELD

ROBERT LEE COBB, et als, Plaintiffs,

v.

THE OMEGA CORPORATION OF CHESTERFIELD Defendant.

Case Number 8341-81

D E C R E E

This cause came to be heard upon the plaintiff's Bill of Complaint; upon the Answer of the defendant; upon the testimony of witnesses and exhibits introduced on behalf of the plaintiffs and defendant at the hearing of this cause on October 2, 1981; and upon argument of counsel and Memoranda of Authorities submitted on behalf of plaintiffs and defendant.

Upon consideration of all of which, and pursuant to the written Opinion Of The Court filed among the papers in the suit and incorporated by reference herein, the Court is of the opinion to and does hereby ADJUDGE, ORDER and DECREE that defendant, its agents and employees be and they hereby are permanently and perpetually enjoined and restrained from constructing, using and maintaining a structure on Lot 4, Block M, Section H, Scottingham to house unrelated persons who dwell in said structure with counselors, or for any other purpose or use other than a single-family residence. To the action of the Court in enjoining defendant, its agents and employees as herein decreed, defendant objects and excepts.

Enter 11/5/81

/s/ Ernest P. Gates
Ernest P. Gates, Judge

Seen:

/s/ N. Leslie Saunders, Jr. p.d.
N. Leslie Saunders, Jr.

Seen and Objected to:

/s/ Donald E. King p.q.
W. Alan Aimes, Jr.
Donald E. King
Steven C. McCallum

OMEGA'S PROPOSED FINDINGS OF FACT

1. The plaintiffs in these two cases are owners of lots in the Providence Pines and Scottingham subdivisions of Chesterfield County.

2. The defendant in both cases, The Omega Corporation of Chesterfield ("Omega"), a nonstock, nonprofit Virginia corporation, is the owner of one lot in Providence Pines and one lot in Scottingham.

3. The lots in Providence Pines, including the lot owned by Omega, are subject to recorded restrictive covenants, of which the following is at issue:

> "1. No lot shall be used except for residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached, single-family

dwelling not to exceed two stories in height and an attached private garage for not more than two cars."

4. The lots in Scottingham, including the lot owned by Omega, are subject to recorded restrictive covenants, of which the following is at issue:

"1. No lot shall be used except for residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached, single-family dwelling not to exceed two stories in height."

5. The restrictive covenants for each subdivision establish architectural committees which must approve construction plans and specifications before any building can be erected, placed, or altered on any lot.

6. On October 31, 1980, Omega contracted with the Design Cooperative,

an architectural firm, to develop plans and specifications for a single-family dwelling to be erected on each of Omega's lots. These plans were submitted to the architectural committees of Providence Pines and Scottingham and were approved by each on June 3, 1981 and June 16, 1981, respectively. At the time they approved the plans and specifications, both architectural committees were aware of Omega's intention to use each dwelling as a residence for four mentally retarded adults.

7. Omega's purpose in constructing the homes is to provide mentally retarded adults with normal residential housing in a community setting including the activities and life-style incident to such a setting.

8. To be eligible for one of the proposed homes, a person must be a resident of Chesterfield County, eighteen years of age or older, and moderately mentally retarded.

9. It is expected that each resident will live in the proposed homes for at least two to three years and that some may live in the homes for the rest of their lives.

10. Four mentally retarded adults will reside in each home. A counselor employed by Chesterfield Mental Retardation Services will be present in each home at all times. This responsibility is to be shared by three counselors employed for each home. The role of the counselors will be that of surrogate parents.

11. On weekdays, each resident will leave the home in the early morning for work, vocational training or some day activity. The residents will return in the late afternoon. With the help of the counselor, they will perform the various duties incident to the normal operation of the home: cooking, cleaning, shopping, and similar household chores. They will also have time for watching television, listening to their stereos, playing games and the like. Near the end of each evening, they will wash up, get ready for the next day, and go to bed.

12. On weekends, the residents will have more free time. They will go on shopping trips, go to the movies, have picnics and engage in typical weekend activities.

13. Aside from the counselors assisting the residents in learning to care for themselves and in learning to perform the various household chores, no educational or vocational training of any kind will be provided at the homes for the residents. Nor will any medical or nursing care be provided at the homes.

14. The residents and counselor will function together as a single housekeeping unit, preparing their own meals, eating together, sharing common facilities and sleeping in ordinary bedrooms.

15. In virtually all respects, other than the mental capacity of those who live on the premises, the homes will operate like a typical suburban household.

16. The Virginia Housing Development Authority ("VHDA") has loaned money to Omega to purchase the lots and has committed to loan money to construct the homes. Its relationship to Omega is that of a lender to a mortgagor.

17. The United States Department of Housing and Urban Development ("HUD") has approved the homes and will provide rent subsidies to the mentally retarded residents whose incomes are sufficiently low to allow them to qualify for such subsidies.

18. In processing the loans for the homes and the documents necessary to obtain HUD approval, VHDA processed the two homes together as one housing development. This was administratively convenient since both homes are to be owned by Omega. For this reason and to

maximize the rental assistance available from HUD, in some VHDA documents, the two single-family dwellings are referred to as a "multi-family housing development". This "multi-family" administrative designation has had no effect on the design of the homes, their physical structure, or the manner in which they will be lived in by the residents.

19. Omega's receipt of loans from VHDA and the possibility of rent subsidies from HUD are incidental to Omega's objective of providing normal residential living in a community setting for mentally retarded adults. In no way has expectation of monetary benefits motivated Omega's efforts.

20. "Single-family" dwelling is not defined in the restrictive covenants of either Providence Pines or Scottingham.

Neither of the developers of these subdivisions had any intention of restricting occupancy of homes in the subdivisions to people related by blood or marriage. No such restriction has ever been enforced in the subdivisions. Across the street from the Omega lot in Providence Pines, three unrelated women schoolteachers reside in the home at 8613 Shady Mist Drive.

21. Omega purchased its Scottingham lot from the Scottingham developer who was aware of Omega's intention to use the lot for a home for mentally retarded adults and who informed Omega's real estate agent that such use would not violate the Scottingham restrictive covenants.

Omega's Equal Protection Argument
In Its Brief on Appeal in the
Virginia Supreme Court

III. Judge Gates' Injunctions against Omega Are a Flagrant Denial of Equal Protection in Violation of the United States Constitution

Judge Gates' Decrees prohibiting Omega's homes for the mentally retarded state:

> [D]efendant, its agents, and employees be and they hereby are permanently and perpetually enjoined and restrained from constructing, using and maintaining a structure on Lot 5, Block A, Providence Pines [Lot 4, Block M, Section H, Scottingham Subdivision], to house unrelated persons who dwell in said structure with counselors or for any other purpose or use other than a single-family residence. (Ap. 77 and 80)

Judge Gates explained this ruling in his October 26, 1981 opinion incorporated by reference in the November 5, 1981 Decrees:

> I believe that a single family dwelling means what it says. Only one family can inhabit the dwelling. . . . A single family does not include occupancy by unrelated persons who live in the home with a counselor. (Ap. 74)

Nowhere in his opinion or in the Decrees granting the injunctions does Judge Gates provide a rational basis for prohibiting occupancy by persons who are "unrelated" and who live with a "counselor". Instead Judge Gates throws reason to the wind, relies on "common sense" for the meaning of family" and summarily concludes that single-family use doe not include occupancy by unrelated persons who live with a counselor.

There are no findings of fact that excluding unrelated persons from the subdivisions will have a beneficial effect of any kind. To the contrary,

Judge Gates' findings of fact conclude the opposite:

> In virtually all respects, other than the mental capacity of those who live on the premises, the homes will operate like a typical suburban household.
>
> Omega's Proposed Findings, ¶ 15, adopted by Judge Gates. (Ap. 34)

Under the circumstances of this case, discrimination against unrelated persons who employ counselors has no rational basis whatsoever. It is an arbitrary addition to the restrictive convenants.

Judicial enforcement in a state court of private deed restrictions offensive to the equal protection requirements of the United States Constitution constitutes state action. Barrows v. Jackson, 346 U.S. 249 (1953); Shelley v. Kraemer, 334 U.S. 1 (1948), see also,

Crowley v. Knapp, supra, at 823 n 2. At the very least, the discrimination ordered by a court must be rationally related to the legitimate governmental interests it purports to further. Here, Judge Gates has articulated no such interests much less any rational relationship between them and the discrimination he ordered.

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) does not absolve Judge Gates' action. In Belle Terre a zoning ordinance restricting occupancy to no more than two unrelated persons was upheld. However, the limitation to two persons as opposed to no more than two persons as opposed to some other number was considered a legitimate exercise of legislative discretion. Here Judge Gates' ruling is not based on the number

of people involved. It is based purely and simply on the fact that they are unrelated, and the fact that this does not comport with Judge Gates' personal "common sense" interpretation of the meaning of "family". This does not meet constitutional muster.

If Judge Gates' ruling is interpreted to rely on the presence of a counselor in the home, it is still without rational basis. Judge Gates has found as fact that:

> The role of the counselors will be that of surrogate parents.
>
> With the help of the counselors, [the mentally retarded residents] will perform the various duties incident to the normal operation of the home: cooking, cleaning, shopping, and similar household chores.
>
> Aside from the counselors assisting the residents in learning to care for themselves and in learning to perform the

> various household chores, no educational or vocational training of any kind will be provided at the homes for the residents. Nor will any medical or nursing care be provided at the homes.
>
> The residents and counselor will function together as a single housekeeping unit, preparing their own meals, eating together, sharing common facilities and sleeping in ordinary bedrooms.
>
> Omega's Proposed Findings of Fact, ¶¶ 10, 11, 13 and 14, adopted by Judge Gates. (Ap. 33-34)

These findings of fact establish that the counselors will serve as surrogate parents performing the functions of parents typical in a suburban household. This precludes rather than provides a rational basis for discriminating against them.

Finally, if Judge Gates' ruling is interpreted as limited to mentally

retarded persons, it again has no rational basis. The uncontradicted evidence at trial and Judge Gates' findings of fact make clear that the moderately retarded adults who will occupy Omega's homes function very close to normal levels. They care for themselves, perform cooking, cleaning, shopping and other household chores, leave the home for work, school, or other day activities and, in short, function like "a typical suburban household." Omega's Proposed Findings of Fact, ¶¶ 10-15 (Ap. 33-34); Steck testimony (Ap. 54-58; Begley testimony (Ap. 62-70). As the Supreme Court of Georgia stated in Douglas County Resources, Inc. v. Daniel, supra, at 735:

> "To enjoin the use of the homes here because the intended occupants are retarded would discriminate against one group

for reasons not established by the evidence."

This case does not involve drug addicts or prisoners or other groups of people whose characteristics might offer a rational basis for exclusion from the subdivisions. It involves moderately handicapped people whose handicap is merely below normal intelligence. Judge Gates' findings of fact again preclude rather than provide a rational basis for their exclusion from the subdivisions

Excerpt from Oral Argument
in the Virginia Supreme Court

Saunders: "The mere fact that the appellant makes the argument about the equal protection under the law cases gives me a great deal of concern. The Texas case in Shaver v. Hunter says that what in that instance, what the people who wanted to build a group home for three mentally retarded ladies with a counselor wanted them to say, was we can enforce this restrictive covenant against everyone but those who are mentally handicapped. I don't

> think the Constitution of the United States will allow this Court or will allow the Virginia Legislature to do that."

Taken from tape recording of June 13, 1984 oral argument. Tape available at the Virginia Supreme Court.

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No. 84-893

In The

Supreme Court of the United States

October Term, 1984

THE OMEGA CORPORATION OF CHESTERFIELD,
Petitioner,

v.

D. DUANE MALLOY, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Should This Court Grant Certiorari Upon Petitioners' Request Where Petitioners Failed To Discuss Or Expressly Reserve The Question Of A Denial Of Equal Protection Before The Supreme Court Of Virginia

Or

When The Decision Of The Supreme Court Of Virginia Was Based Upon Adequate State Grounds And No Substantial Federal Question Is Presented?

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OPINIONS AND ORDERS BELOW

Respondents accept Petitioners' statement of the applicable opinions and orders below and incorporate same by reference.

JURISDICTION

Respondents deny that this Court has jurisdiction because the Petitioner's petition for a Writ of Certiorari contains none of the reasons set forth in Rule 17 of the Rules of the United States Supreme Court nor does the petition allege a question concerning the validity of a State statute on the ground that it is repugnant to the Constitution of the United States. 28 U.S.C. § 1257(3). There is no Constitutional provision involved.

———o———

STATEMENT OF THE CASE

The Omega Corporation of Chesterfield ("Omega") is a non-stock, non-profit Virginia Corporation, which owns a lot in Scottingham Subdivision and a lot in Providence Pines Subdivision in Chesterfield County, Virginia. Omega proposes to build homes to house four mentally retarded adults with 24 hour supervision provided by counselors employed by Chesterfield Mental Retardation Services, Inc. The four mentally retarded adults would not be able to come and go from the residence in either subdivision as they pleased, but only with the consent and supervision of a counselor. Upon learning of the plans of Omega to construct these group homes in their subdivisions, 31 homeowners of the Scottingham subdivision, Section 8, and 22 homeowners from Providence Pines subdivision filed Bills of Complaint in the Circuit Court of Chesterfield County, Virginia, to enjoin the construction and operation of the group homes.

The most casual reading of the trial court's memorandum of opinion alerts one that, contrary to the repre-

sentations of the petitioner, the trial judge did not adopt Omega's proposed findings of fact. The trial court adopted Omega's proposed findings of fact and additional findings and facts from testimony given at the trial. Pet. App. at 38a. Many of the proposed findings of facts were contradicted by testimony at the trial, including oral testimony as well as exhibits accepted as evidence. This is obvious from the decision of the trial court.

The petitioner has listed in its trial brief and its written brief before the Virginia Supreme Court its argument that denial of group homes in the two subdivisions would constitute a "flagrant" denial of equal protection in violation of the Fourteenth Amendment of the United States Constitution. The petitioner, however, made no such argument before the trial court or the Virginia Supreme Court. Neither the trial court nor the Virginia Supreme Court considered the equal protection argument in making their decisions.

The trial court's opinion plainly shows that the trial court's decision was based upon contract and property laws of the Commonwealth of Virginia without considering any Federal rights. Pet. App. at 38a.

The opinion of the Virginia Supreme Court again clearly expresses a decision based upon the interpretation of state laws and involves no decision concerning Federal rights. Pet. App. at 1a. In addition, Chief Justice Harry L. Carrico, who was joined in the majority opinion by the five next senior members of the Court, stated clearly that the argument by the petitioner of a denial of equal protection was waived. Pet. App. at 20a.

> On brief, Omega argued that the chancellor's injunctions result in a denial of equal protection because

> they discriminate against unrelated persons and those who are mentally retarded. This point, however, was neither discussed nor expressly reserved at oral arguments; hence, we consider the point waived. *Stevens v. Ford Motor Co.*, 226 Va. 415, 417n., 309 S.E. 2d 319, 320n.(1983).

No appellate court will allow an attorney to take a "shotgun" approach in his or her brief just in case the important points the attorney pursues are not successful. Not only is this a well-known rule of appellate procedure, but it had been specifically pronounced by the Virginia Supreme Court in four of its decisions since 1980. The Virginia Supreme Court properly found that petitioner had waived the argument concerning equal protection.

The dissenting opinion upon which the petitioner completely relies was written by the junior Justice without a concurrence by a single Justice. The petitioner, would have you believe that the dissenting opinion is the controlling law in the Commonwealth of Virginia. I submit to this Court that this case was properly decided upon Virginia Law. No federal rules or rights were at issue before the Virginia Supreme Court.

REASONS FOR DENYING THE WRIT

I. The Court Should Deny The Petition Since The Petitioner Failed To Discuss Or Expressly Reserve At Oral Argument Its Contention That The Trial Court's Injunctions Resulted In A Denial Of Equal Protection Because They Discriminate Against Unrelated Persons And Those Who Are Mentally Retarded.

Since the petitioner did not present the argument of equal protection before the two State Courts, it cannot

present the argument before the United States Supreme Court.

Certainly if the petitioner had felt that the restrictive covenants of the two subdivisions when enforced by the State Court caused a denial of equal protection of the law for four mentally retarded persons living with counselors, then surely petitioner would have argued, emphasized and preserved this point before the trial court and the Virginia Supreme Court. It is clear from its presentation of its case that the petitioner knew the trial court and the Virginia Supreme Court were to determine the issue of enforceability of the restrictive covenants based on state contract and property laws, and that the Constitutional question of equal protection under the Fourteenth Amendment of the United States Constitution was not an issue before either Court. Since petitioner waived this point before the Virginia Supreme Court, it cannot now raise the point of equal protection before this Court.

II. The Petition Should Not Be Granted Because The Judgment Of The State Court Rests On Adequate And Independent State Grounds.

The United States Supreme Court has consistently held that it would not review judgments of State Courts that rest on adequate and independent state grounds. In the case of *Herb v. Pitcairn,* 324 U.S. 117, 125 (1954), the Court stated:

> This Court from the time of its foundation has adhered to the principal that it will not review judgments of State Courts that rest on adequate and independent grounds . . . Our only power over State judgments is to correct them to the extent that they incorrectly ad-

> judge federal rights and our power is to correct wrong judgments, not to revise opinions.

This Court has held that in order to review the decision of a State Court, it must appear that the federal question was decided and that its decision was essential to the disposition of the case. This Court has gone so far as to say where it is not clear whether the judgment rests on a federal ground or adequate State one, the Court will not review the State decision. (*Herb v. Pitcairn* supra).

Nothing could be clearer than the decision, written by Chief Justice Carrico of the Virginia Supreme Court, that this case was decided by that State Court on adequate and independent state grounds. The opinion does not discuss any federal question, right or rule. It judiciously discusses the decisions of the Virginia Supreme Court and reaches a conclusion that is consistent with the prior decisions of that Court. The very essence of an Appellate Court is to make decisions consistent with its precedents giving order to society.

Surely this Court cannot consider the appeal presented to it by the petitioner when it has previously stated that

> We are without jurisdiction when the question of the existence of an adequate state ground is debatable. Even when the highest Court of a State delivers no opinion, and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment. *Stembridge v. Georgia,* 343 U.S. 541, 547 (1952).

In the case of *Black v. Cutter Laboratories,* 351 U.S. 292, 299 (1956) this Court stated that

As such, the decision involves only California's construction of a local contract under local law, and therefore no substantial federal question is presented. Moreover, even if the State Court's opinion be considered ambiguous, we should choose the interpretation which does not face us with a Constitutional question.

III. The Petition Should Not Be Granted Because It Is Not A Denial Of Equal Protection For A State Court To Enforce A Single-Family Deed Restriction So As To Deny The Construction And Operation Of A Facility For Four Mentally Retarded Persons Living With Counselors.

Nowhere in the restrictive covenants interpreted by the trial court and the Virginia Supreme Court is there a prohibition against mentally retarded adults. Petitioner has chosen to continue to ignore this fact in its arguments before the Court. There is nothing in the restrictive covenants of either subdivision which would prevent mentally retarded adults from living in these subdivisions. The restrictive covenants simply prevent the construction and operation of a facility such as the one proposed by Omega. The finding by the State Courts that such a facility is different from a single-family residence is so obvious that it needs no amplification. The residents of the proposed facility would neither be landowners nor tenants under executed leases. They would not be free to come and go as they please. They would not be living in the residence with the permanency of normal residential dwellings. These are merely a few of the differences between the facility proposed by Omega and a single-family dwelling envisioned by the other homeowners in the subdivisions.

The case of *Cleburne Living Center v. City of Cleburne, Tex.*, 726 F. 2d 191 (5th Cir. 1984) *Cert. granted,*

53 U.S.L.W. 3355 (U.S. November 13, 1984) No. 84-468, which is relied upon so heavily by the petitioner, is clearly distinguishable from this case. In the *Cleburne* case, the Court was confronted with a city zoning ordinance. The zoning ordinance interpreted by the Court in the *Cleburne* case is clearly exclusionary. It specifically excludes a class of people from enjoying property under a specific zoning classification. There is no exclusionary law or ordinance before this Court in the present case.

While the petitioner has abandoned several of its cases previously cited, it continues to cite *Shelley v. Kraemer*, 334 U.S. 1, 17-18, (1948). The *Shelley* case interpreted a restrictive covenant forbidding non-caucasians to own and inhabit property in subdivisions. This again was an exclusionary restrictive covenant that violated the very essence of the Fourteenth Amendment which was adopted to free all Americans. The restrictive covenants now before this Court do not exclude anyone who wishes to live in a single-family dwelling. The purpose for which Omega wishes to use the lots purchased by it is for a facility, not a single-family dwelling. The mental capacity of the inhabitants of the proposed group homes had and has absolutely nothing to do with the decision of the Virginia Courts. The Courts simply found that the proposed use by the Omega Corporation resulted in the creation of a facility and not a single-family dwelling under the reasonable interpretation of the restrictive covenants.

Instead of equal protection, the petitioner would have this Court as it unsuccessfully urged upon the Virginia Supreme Court, create a decision of preference. Mr. Justice Powell in his opinion in *University of California Re-*

gents v. Bakke, 438 U.S. 265, 293-98 (1978) expresses the concern of this Court when he addresses the "serious problems of justice connected with the idea of preference itself."

CONCLUSION

Inasmuch as the equal protection argument presented in the petition was waived before the Virginia Supreme Court, that the decision of the Virginia Supreme Court was founded upon independent and adequate state grounds and the decision does not deny either the petitioner or mentally retarded persons equal protection under the law, the petition for writ of certiorari to review the judgment and opinion of the Virginia Supreme Court should be denied.

Respectfully submitted,

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(3)

NO. 84-893

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1984

THE OMEGA CORPORATION OF CHESTERFIELD,

Petitioner,

v.

D. DUANE MALLOY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

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QUESTION PRESENTED

I. WHETHER IT IS A DENIAL OF EQUAL PROTECTION FOR A STATE COURT TO ENFORCE A SINGLE-FAMILY DEED RESTRICTION SO AS TO ALLOW HOUSEHOLDS SUCH AS THREE UNRELATED SCHOOLTEACHERS AND HOUSEHOLDS CONTAINING MAIDS, GOVERNESSES AND THE LIKE WHILE PROHIBITING HOUSEHOLDS OF FOUR MENTALLY RETARDED PERSONS LIVING WITH COUNSELORS WHO SERVE AS SURROGATE PARENTS?

PARTIES

Petitioner, The Omega Corporation of Chesterfield, is a private, non-profit Virginia corporation with no parent company, subsidiaries or affiliates. Respondents are the following individuals: D. Duane Malloy, Cynthia R. G. Malloy, Frank Barone, Diane Barone, Vernleigh H. Morton, Alfrieda T. Morton, Norbert S. Keeney, Evelyn V. Keeney, William R. Hill, III, Louis W. Headley, Sr., Eileen H. Headley, Virginia B. White, Davene S. Winters, Kenneth D. Dotson, Judith H. Dotson, Wyatt D. Mitchell, Amy L. Hofmann Mitchell, Jeffrey R. Cosgrove, Lorraine M. Cosgrove, Marvin O. Lindsey, Ken A. Clayton, Gail A. Clayton, Robert Lee Cobb, Beverly B. Cobb, Peter Sattelmayer, Theresa Sattelmayer, Elwood G. Everington, Frances Everington, D. Allen White, Pam White, Marvin W. Bubie,

Rebecca D. Bubie, Stephen H. Grayberg, Ruth Grayberg, R. J. Rountree, Brenda Rountree, James Phillips, Jr., Sandy Phillips, E. S. Kile, Teresa T. Kile, John O. Stein, II, Geraldine G. Stein, William R. Petzold, Patricia A. Petzold, Paul E. Walsh, Jr., Beverly B. Walsh, Randy B. Cox, Fay C. Cox, D. C. Foxx, R. T. Foxx, Dorothea M. Smith, A. J. Christopher Wood and David A. Schneider.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

Pressing as their first line of attack that Petitioner has waived its equal protection claim, Respondents implicitly concede that the equal protection claim was discussed during oral argument before the

Virginia Supreme Court. Clearly, the constitutional claim was not waived as Respondents and the Virginia Supreme Court would have this Court believe. According to Chief Justice Carrico's majority opinion, Omega's equal protection claim was waived because it

> Was neither discussed nor expressly reserved at oral argument.

Pet. App. at 20a. However, counsel for respondents himself discussed Omega's equal protection claim:

> The mere fact that appellant makes the argument about the equal protection under the laws cases gives me a great deal of concern. The Texas case in Shaver v. Hunter says that what in that instance, what the people who wanted to build a group home for three mentally retarded ladies with a counselor wanted them to say, was we can enforce this restrictive covenant against everyone but those who are mentally handicapped. I don't think the Constitution of the

> United States will allow this Court or will allow the Virginia legislature to do that.

Pet. App. at 67a. Recognizing this discussion, respondents carefully argue in their Brief in Opposition that "Petitioner" failed to discuss its equal protection claim. Respondents do not and cannot argue that there was no discussion of Omega's equal protection claim as the waiver rule expressly requires.

Respondents' characterization of Omega's equal protection claim as part of a "shot gun approach" is misleading. Omega had two and only two Questions Presented before the Supreme Court of Virginia:

> 1. Whether Judge Gates has properly interpreted the single-family dwelling requirement in the Providence Pines and Scottingham Restrictive Covenants. (Assignments of Error 1 and 2)

2. Whether enforcement of the restrictive covenants as interpreted by Judge Gates results in a denial of equal protection in violation of the United States Constitution. (Assignment of Error 3)

Questions Presented, Omega's Brief in the Supreme Court of Virginia, page 3. Indeed, counsel for respondents considered Omega's equal protection claim to be so central to the issues in the case that he discussed it himself during oral argument before the Virginia Supreme Court.

During oral argument, counsel for Omega spent a substantial portion of his allotted time discussing the discriminatory nature of excluding Omega's proposed homes while allowing other groups of unrelated persons and households with maids, governesses and the like. Counsel for respondents explicitly criticized Omega's

equal protection claim. The Virginia Supreme Court chose to avoid dealing with Omega's federal Constitutional rights and therefore declared they had been waived. That ruling does not bind this Court. Rogers v. Alabama, 192 U.S. 226, 230-31 (1904); Nickel v. Cole, 256 U.S. 222, 225 (1921).

Respondents' argument that the Virginia judgment rests on adequate and independent state grounds is simply incorrect. The very rule of Virginia law which the Virginia Supreme Court created, namely the definition of "family", gives rise to the federal issue.

As argued in Omega's Petition, the Virginia Supreme Court's exclusion of Omega's proposed homes from its definition

of single-family dwellings is a denial of equal protection.

CONCLUSION

Omega's Petition for Writ of Certiorari to the Supreme Court of Virginia should be granted.

Respectfully submitted,

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*Counsel of Record

January 16, 1984

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for a Writ of Certiorari to the Supreme Court of Virginia with Appendix were mailed by depositing the documents in a United States Post Office with first-class postage prepaid, addressed to N. Leslie Saunders, Jr., Esq., Saunders, Hundley & Gilliam, 2500 Pocoshock Place, P. O. Box 35001-C, Richmond, Virginia, 23235, counsel of record for Respondents, on this 16th day of January, 1985.

Anne Marie Whittemore